

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
July 10, 2009 Session

**KIMBERLY RENE SMITH v. STEPHEN WARD SMITH, SR.**

**Appeal from the Circuit Court for Wilson County**  
**No. 4743DVC Clara Byrd, Judge**

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**No. M2008-01589-COA-R3-CV - Filed September 2, 2009**

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Father filed a Petition to Modify Visitation and Child Support based upon a change in circumstances; Mother filed a Counter-Petition for Criminal Contempt based on Father's failure to comply with aspects of the Final Decree of Divorce. Father appeals the trial court's application of an upward deviation to his modified child support obligation; order to obtain and provide health insurance for a minor child; failure to order Mother to obtain a life insurance policy for the benefit of the minor child; monetary award to Mother for reimbursement of child's contribution to the purchase of an automobile; failure to apply his modified child support obligation retroactively; award of attorneys' fees to Mother; and denial of a post-trial petition for modification to further reduce his child support obligation based on post-trial changes in circumstances. Finding that the trial court erred in applying an upward deviation to Father's modified child support obligation, in awarding Mother a monetary judgment for child's contribution to the purchase of an automobile and in awarding Mother attorneys' fees, the judgment is reversed. The judgment denying Father's post-trial petition for modification is vacated and the case remanded for further hearing thereon. The trial court's judgment is affirmed in all other respects.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court**  
**Affirmed in Part, Reversed in Part, Vacated in Part and Remanded**

RICHARD H. DINKINS, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and ANDY D. BENNETT, JJ., joined.

Paula Ogle Blair, Nashville, Tennessee, for the appellant, Stephen Ward Smith, Sr.

Brenda Rhoton Clark, Nashville, Tennessee, for the appellee, Kimberly Renea Smith.

**OPINION**

**I. Procedural and Factual History**

On December 5, 1989, Kimberly Renea Smith ("Mother"), who was not married at the time, gave birth to her first child. When Mother was 8 months pregnant with her first child, she told

Stephen Ward Smith (“Father”) that he was the father of the child.<sup>1</sup> Mother and Father were married on July 20, 1991, and Mother gave birth to a second child on May 16, 1994.

On July 20, 2004, Mother filed a petition for divorce. On November 5, 2004, the trial court entered a Final Decree of Divorce, incorporating a Marital Dissolution Agreement and a Parenting Plan, which contained the following pertinent provisions: (1) Mother was designated primary residential parent and Father alternative residential parent; (2) Father was provided visitation with the children; (3) Father was to pay \$1,000.00 per month in child support; (4) Mother was to provide health insurance for the children as long as it was available through her employer but, if not, Father would obtain health insurance for the children; and (5) Father was to obtain life insurance in the amount of \$100,000 for the benefit of the children.

On April 7, 2006, Father filed a Petition to Modify Visitation and Child Support, alleging that his current schedule allowed him more time to spend with the children and that he was entitled to a reduction in child support based upon his and Mother’s current income levels. On June 1, Mother answered the petition and filed a Counter-Petition for Criminal Contempt, alleging that Father made derogatory remarks about Mother in the presence of the children; interfered with Mother’s parenting time; failed to reimburse Mother for uncovered medical expenses for the children; failed to timely pay child support; threatened to take away the first child’s car, which Father bought using \$2,000 that the child contributed towards the purchase; and failed to produce proof that he obtained life insurance. Father answered the Counter-Petition on June 19.

At some point during the proceedings, Father asked to have DNA testing done to determine the paternity of the first child; the test revealed that the child was not Father’s biological child. The parties were ordered to mediation and a Pendente Lite Order entered on May 4, 2007, memorialized the following agreement: (1) child support for the first child would terminate and Father would begin paying \$550.00 per month in child support for the second child; (2) Father would provide health insurance for the second child since Mother was unemployed; and (3) Father’s life insurance policy coverage would be reduced to \$50,000. The order acknowledged that the first child was not the biological child of Father and terminated Father’s parental rights.

Mother thereafter filed a Motion to Amend her Counter-Petition for Contempt, adding an allegation that Father failed to make monthly payments on a vehicle which was awarded to Father in the divorce, but remained in Mother’s name. Father also filed a Motion to Amend his Petition, adding an allegation that Mother fraudulently induced Father into marrying her and seeking a reimbursement for child support paid for the first child from the entry of the Final Decree of Divorce. The trial court allowed both amendments.

A hearing was held on February 20, 2008, and an order entered on April 1 ordered, in part pertinent, that: Father provide health insurance for the second child; Father reimburse Mother \$889.09 for the money the first child paid toward the purchase of a vehicle; and Father was guilty

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<sup>1</sup> Seventeen years later it was determined that Mr. Smith was not the father of her first child.

of criminal contempt for making derogatory comments about Mother in the presence of the children. The court denied Father's request for reimbursement of child support paid for the first child. The order incorporated a Parenting Plan that established a new visitation schedule; required Father to pay \$686.43 per month in child support; and required Father to maintain a \$50,000 life insurance policy with Mother named as trustee for the second child. The court denied Mother's application for attorneys' fees.

On May 1, 2008, Father filed a Motion to Alter or Amend. In an order entered on June 18, 2008, the trial court denied the motion and modified the April 1 order to award Mother \$5,000 in attorneys' fees. Father appeals.

## **II. Statement of the Issues**

Father asserts the following issues on appeal:

1. Whether the trial court erred in its failure to reduce Father's child support obligation after the emancipation of the first child
2. Whether the trial court erred in ordering Father to continue to provide health insurance coverage.
3. Whether the trial court erred in ordering Father to pay a percentage of the second child's extracurricular activities as part of Father's child support obligation.
4. Whether the trial court erred in awarding Mother \$5,000 in attorney's fees.
5. Whether the trial court erred in its failure to order Mother to maintain a \$50,000 life insurance policy.
6. Whether the trial court erred in ordering Father to reimburse Mother the money for the first child's vehicle.
7. Whether the trial court erred in failing to order modification of Father's support obligation to be retroactive.

## **III. Analysis**

### *A. Child Support*

Father asserts that a significant variance existed warranting the modification of his child support obligation at the time his Motion to Alter or Amend was heard and that the trial court erred in failing to order such modification; in applying an upward deviation to his modified child support obligation; in modifying the obligation regarding the children's health insurance set forth in the Final

Decree of Divorce; in failing to apply his modified child support obligation retroactively to the filing date of his Petition to Modify Child Support; and in failing to order Mother to obtain a life insurance policy for the benefit of the second child

*1. Modification in the Parties' Presumptive Child Support Obligations Based Upon the Emancipation of the First Child*

Pursuant to the Pendente Lite Order entered May 4, 2007, Father's parental rights to the first child were terminated; consequently, he was no longer responsible for providing support for the child<sup>2</sup> and his child support obligation was reduced to \$550.00 per month. In the calculation of Father's child support obligation in the April 1, 2008 order, a \$450.00 credit to Mother's monthly income for the first child as an "in-home child"<sup>3</sup> living with Mother but not part of the case, pursuant to Tenn. Comp. R. & Regs. 1240-2-4-.04(5)(a),<sup>4</sup> was applied and resulted in a presumptive child support obligation of \$635.00 per month. At the time of the hearing leading to the April 1 order, the child was 18 years old,<sup>5</sup> but had not graduated from high school.

On May 1, 2008, Father filed a Motion to Alter or Amend, asking that the April 1 order be amended to "include a reduction in Father's child support obligation as of the date [the first child] turns 18 and graduates from high school." At the June 8 hearing on the motion, the trial court's discussion regarding Father's request for a reduction in child support focused on whether a "15

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<sup>2</sup> Tenn. Comp. R. & Regs. 1240-2-4-.02(14) states, in part pertinent, that "a person is 'legally responsible for a child' or legally obligated for a child or children when the child is or has been...[v]oluntarily acknowledged by the parent as the parent's child pursuant to Tennessee Code Annotated § 24-7-113..." Tenn. Code Ann. § 24-7-113 states, in part pertinent, that "[t]he test results certified under oath by an authorized representative of an accredited laboratory shall be filed with the court and shall be admissible on the issue of paternity" and "[i]f the acknowledged father is found to be excluded by the tests,...the acknowledgment of paternity shall be rescinded, as appropriate." Tenn. Code Ann. § 24-7-113(e)(3).

<sup>3</sup> The Child Support Worksheet classifies this credit as a "Credit for in-home children."

<sup>4</sup> Tenn. Comp. R. & Regs. 1240-2-4-.04(5) states, in part pertinent, that:

(a) ...credits for either parent's other children, who are qualified under this paragraph, shall be considered by the tribunal for the purpose of reducing the parent's gross income. Adjustments are available for a child:

1. For whom the parent is legally responsible; and
2. The parent is actually supporting; and
3. Who is not before the tribunal to set, modify, or enforce support in the case immediately under consideration.

<sup>5</sup> Mother's original complaint for divorce confirmed that the first child was born on December 5, 1989; on February 20, 2008, the child was 18 years old.

percent variance” to warrant a decrease in his obligation existed.<sup>6</sup> The trial court denied Father’s motion, without explanation, in an order entered on June 18.

On appeal, Father asserts that the trial court “treated the Motion to Alter or Amend like a new petition, in regard to child support,” but does not challenge this action.<sup>7</sup> Rather, he contends that the court erred in finding that he failed to prove that the child support obligation he proposed<sup>8</sup> would be a significant variance from the “current support order,” as required by Tenn. Comp. R. & Regs. 1240-2-4-.05. Father argues that the trial court erred in comparing the child support obligation he proposed with the support awarded in the April 1 order because the April 1 order was not yet final when he filed his Motion to Alter or Amend and that “[a] significant variance, pursuant to Comp. R. & Regs. 1240-2-4-5 [sic], is determined by comparing final orders.” Father contends that “the Trial Court should have made a determination of whether a significant variance existed based upon the amount of support in the Final Decree, i.e., \$1,000.00 and the amount proposed by Father, i.e., \$589.00.”

Contrary to Father’s assertion that significant variance is determined by comparing *final* orders, Tenn. Comp. R. & Regs. 1240-2-4-.05 defines a significant variance as “[a]t least a fifteen percent (15%) change between the amount of the *current support order* and the proposed amount of the obligor parent’s pro rata share of the [basic child support obligation].” Tenn. Comp. R. & Regs. 1240-2-4-.05(2)(b), (c) (emphasis added). The April 1 order contained the signatures of the trial judge and Mother’s counsel, and a certificate of service; consequently, the order became effective as of that date, pursuant to Rule 58, Tenn. R. Civ. P.,<sup>9</sup> and was the current support order.

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<sup>6</sup> At the hearing, the trial court, in regard to Father’s modification request, held the following colloquy with Mother’s attorney:

[Mother’s Attorney]: ...[Father] wants a reduction in the child support, because [the first child], the oldest child, turned 18 and graduated from high school. Well, at the time of this hearing, February 20<sup>th</sup>, he wasn’t - - he had not reached 18. He had not graduated from high school...

THE COURT: Is there a 15 percent - -

MS. CLARK: - - is there a 15 percent variance? If there is, he can file a petition and we can agree to it. But I don’t think it meets the 15 percent variance.

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THE COURT: ...I’ve ruled on income based on the proof. So if there is a 15 percent variance, I’m sure y’all will be back before me. But don’t bother to come back on an increase or decrease unless there is at least a 15 percent variance pursuant to your discovery.

<sup>7</sup> In our review of the trial court’s action, we shall treat the motion as having properly raised a request to modify Father’s child support.

<sup>8</sup> The record reflects a child support worksheet filed on June 6, 2008, in which Father’s presumptive child support obligation was \$589.00 per month.

<sup>9</sup> Rule 58, Tenn. R. Civ. P., states, in part pertinent, that:

Entry of a judgment or an order of final disposition is effective when the judgment containing one of  
(continued...)

Having determined that the April 1 order was properly utilized by the trial court in its significant variance analysis, we now turn to whether the trial court properly conducted the analysis.

“To determine if a modification is possible, a child support order shall first be calculated on the Child Support Worksheet using current evidence of the parties’ circumstances.” Tenn. Comp. R. & Regs. 1240-2-4-.05(3). The trial court is then required to “compare the presumptive child support order amounts in the current and proposed orders” and, “[i]f a significant variance exists between the two amounts, such a variance would justify the modification of a child support order.” *Id.* “For all orders that were established or modified January 18, 2005 or after, under the income shares guidelines, a significant variance is defined as at least a fifteen percent (15%) change between the amount of the current support order (not including any deviation amount) and the amount of the proposed presumptive support order.” Tenn. Comp. R. & Regs. 1240-2-4-.05(2)(c).

Once the trial court treated Father’s Motion to Alter or Amend as a petition to modify child support, the court was required to use the Child Support Worksheet to calculate the proposed child support obligation based upon the “current evidence of the parties’ circumstances” and to compare that amount to the current child support obligation to determine if a significant variance existed. Tenn. Comp. R. & Regs. 1240-2-4-.05(3). Upon a review of the record, we do not find that the trial court conducted the analysis in accordance with the regulation. Specifically, the record does not include a worksheet reflecting the proposed child support obligation removing the in-home child credit and, without that figure, the trial court was unable to properly determine if a significant variance existed<sup>10</sup> and we are unable to properly review the court’s determination. Accordingly, we must remand the case for reconsideration of the issue.

## *2. Upward Deviation*

Father contends that the trial court erred in ordering him to pay a percentage of the expenses for the second child’s extracurricular activities as an upward deviation from his basic child support obligation because “[t]here were no written findings by the Trial Court that the deviation from the Guidelines [was] in the best interest of the minor child” and “Mother failed to provide proof of uniform fees in the form of receipts or even a written notice to the parents that a uniform fee exist[ed].” We find that the trial court erred in its application of the upward deviation to Father’s child support obligation.

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<sup>9</sup>(...continued)

the following is marked on the face by the clerk as filed for entry:

(1) the signatures of the judge and all parties or counsel, or  
(2) the signatures of the judge and one party or counsel with a certificate of counsel that a copy of the proposed order has been served on all other parties or counsel, or  
(3) the signature of the judge and a certificate of the clerk that a copy has been served on all other parties or counsel.

<sup>10</sup> Our holding is based upon the fact that the parties acknowledge that, at the time of the hearing on Father’s motion, the oldest child had become emancipated. We make no determination as to whether a significant variance exists with the in-home child credit eliminated.

When a court orders a deviation from the basic child support obligation,<sup>11</sup> the order is to include:

1. The reasons for the change or deviation from the presumptive amount of child support that would have been paid pursuant to the [Child Support] Guidelines; and
2. The amount of child support that would have been required under the Guidelines if the presumptive amount had not been rebutted; and
3. How, in its determination,
  - (i) Application of the Guidelines would be unjust or inappropriate in the particular case before the tribunal; and
  - (ii) The best interest of the child for whom support is being determined will be served by deviation from the presumptive guideline amount.

Tenn. Comp. R. & Regs. 1240-2-4-.07(1)(c).<sup>12</sup>

In the Child Support Worksheet incorporated into the April 1 order, the trial court calculated Father's "Presumptive Child Support Order" to be \$635.00 per month, to which the court added \$51.43 as an upward deviation for the second child's baseball expenses.<sup>13</sup> In the Parenting Plan, Father's child support obligation was set at \$686.43 per month - the presumptive child support order plus the upward deviation - but the order failed to explain the upward deviation.

At the February 20 hearing, Father's counsel stated that "[w]e had talked about some kind of proof, some kind of receipt showing that the baseball fees were \$700" and asked to "have those as a late filed exhibit." At the June 6 hearing on Father's Motion to Alter or Amend, Mother filed exhibits showing that she incurred \$322.96 in baseball expenses.<sup>14</sup>

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<sup>11</sup> In addition to the "average child rearing expenditures," a court may award extraordinary expenses, which "are considered on a case-by-case basis in the calculation of support and are added to the basic support award as a deviation." Tenn. Comp. R. & Regs. 1240-2-4-.07(2)(d).

<sup>12</sup> "The amount or method of such deviation is within the discretion of the tribunal provided, however, the tribunal must state in its order the basis for the deviation and the amount the child support order would have been without the deviation." Tenn. Comp. R. & Regs. 1240-2-4-.07(1)(b).

<sup>13</sup> The trial court found that the second child's baseball expenses were \$935 per year, which corresponds to \$77.92 per month. Father's "Percentage Share of Income," as calculated by the Child Support Worksheet, was 66%. The court ordered Father to pay \$51.43 per month, or 66% of the \$77.92 monthly expense, as an upward deviation.

<sup>14</sup> The exhibits filed by Mother contained a letter from Shari Harper, a member of the Mt. Juliet Booster Club, stating that the letter was "a receipt for sweat [sic] and sweatshirt purchased for [the second child] for the 2008 baseball season" and that the "cost of these was \$65.00 and payment was received from [Mother]"; a paper from the Mt. Juliet baseball team stating that the fee for the baseball season was \$60.00 and a printout from Mother's records confirming that a check in that amount had been submitted to the league; a copy of a check written to Dick's Sporting Goods in the  
(continued...)

The trial court did not include “written findings of fact stating...[t]he reasons for the change or deviation from the presumptive amount of child support” in either its order or in the Parenting Plan, as required by the regulations. Tenn. Comp. R. & Regs. 1240-2-4-.07(1)(c). In addition, the evidence submitted by Mother “quantified” the baseball expenses incurred as \$322.96, rather than the \$935 per year as found by the trial court. Tenn. Comp. R. & Regs. 1240-2-4-.07(2)(d) and (2)(d)(2)(i).<sup>15</sup> Upon a review of the record, we cannot find any evidence to support the trial court’s finding that the baseball expenses were \$935 per year, other than Mother’s testimony, which was contrary to the documentary evidence of the expenditures she filed. While a deviation from a presumptive child support obligation is within a trial court’s discretion, it can only be applied if the deviation is in compliance with the regulations and is properly supported by the evidence, which this was not. Consequently, we vacate the upward deviation for the extraordinary expenses.

### 3. Health Insurance

Father asserts that the trial court erred in ordering him to provide health insurance for the second child because Mother failed to allege or prove a material change in circumstances to warrant a modification of the health insurance provision of the Final Decree of Divorce. Mother contends that “it is truly irrelevant which parent carries the health insurance as the premium is calculated into the support and the parties percentage of income determines the amount assigned to each party for payment.”

Pursuant to the Child Support Guidelines, “[t]he total amount of the cost for the child’s health insurance premium...shall be divided between the parents pro rata based upon the [Percentage Share of Income] of each parent to determine the total Presumptive Child Support Order.” Tenn. Comp. R. & Regs. 1240-2-4-.04(8)(a)(3). “If the health insurance premium is being paid by the [alternative residential parent (“ARP”)]..., the payment shall be reflected in the child support order to identify the amount and nature of the obligation, but shall not be included in the ARP’s income assignment.” Tenn. Comp. R. & Regs. 1240-2-4-.04(8)(a)(4). Instead, the order need only “require that [the health insurance] expenses continue to be paid by the ARP in the same manner as they were being paid prior to the instant action.” *Id.*

The Final Decree of Divorce required “Mother [to] maintain medical/hospital insurance on the minor children as long as it is available to her through her employer” and that “[i]n the event that insurance is not available to Mother through her employer, Father shall provide medical/hospital insurance on the minor children.” The Pendente Lite Order agreed to by the parties stated that

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<sup>14</sup>(...continued)

amount of \$197.69 with the memo section of the check filled in with “[the second child]-Baseball”; and, along with the check paid to Dick’s Sporting Goods, printouts from Dick’s Sporting Goods’ website of the baseball items Mother purchased for the second child and the prices, which add up to the amount of the check.

<sup>15</sup> Among these extraordinary expenses are “[s]pecial expenses incurred for child rearing *which can be quantified* [and] may be added to the child support obligation as a deviation from the [Presumptive Child Support Order].” Tenn. Comp. R. & Regs. 1240-2-4-.07(2)(d)(2)(i) (emphasis added).

“Mother being currently unemployed, the Father shall immediately obtain health insurance on the parties’ minor child...through the Father’s employment or otherwise, and at the Father’s expense, pending further Orders of the Court.” The Parenting Plan, filed along with the April 1 order, stated that “[r]easonable health insurance on the child or children will be...maintained by the Father.”

According to the Child Support Worksheet attached to the Parenting Plan, Father’s Percentage Share of Income was 66%, Mother’s was 33%, and Father’s basic child support obligation, adjusted for each party’s parenting time, was \$651.64 per month. The worksheet listed the child’s health insurance premium as \$49.50 per month, of which Mother was responsible for 33% or \$16.83. Tenn. Comp. R. & Regs. 1240-2-4-.04(8)(a)(3). In calculating Father’s presumptive child support obligation of \$635.00 per month, Mother’s share of the health insurance premium - \$16.83 per month - was subtracted from Father’s basic child support obligation - \$651.64 per month. Thus, the trial court’s decision on health insurance coverage for the second child required Father to continue paying the premium but reduced his child support obligation to account for Mother’s pro rata obligation on the expense.

The trial court did not err in requiring Father him to maintain the health insurance coverage on the second child since it was previously being paid by him as the ARP, Tenn. Comp. R. & Regs. 1240-2-4-.04(8)(a)(4), and his basic child support obligation was reduced to account for Mother’s pro rata share of the premium. Tenn. Comp. R. & Regs. 1240-2-4-.04(8)(a)(3). Father’s assertion that the trial court erred in modifying the health insurance obligation in the Final Decree of Divorce is incorrect because the court’s modification was made pursuant to the Pendente Lite Order, not the Final Decree of Divorce. Tenn. Code Ann. § 36-5-101 provides that a “court may direct the acquisition or maintenance of health insurance covering each child of the marriage” and that “[n]othing in this section shall be construed to prevent the affirmation, ratification and incorporation in a decree of an agreement between the parties as to child support.” Tenn. Code Ann. § 36-5-101(h)(1), (j). The Pendente Lite Order,<sup>16</sup> agreed to by Father, required him to obtain and provide health insurance for the second child “pending further Orders of the Court”; the trial court’s order for Father to maintain the insurance was done in accordance with the regulations.

#### *4. Retroactive Application of Father’s New Support Obligation*

Father asserts that his new child support obligation should have been applied retroactively to the April 7, 2006, filing of his initial Petition to Modify Visitation and Child Support and, in his Motion to Alter or Amend, sought an amendment to the trial court’s April 1 order to have Mother’s award of an “arrearage for the medical bills and child support be deemed satisfied due to the fact that Father paid \$900.00 for the support of [the first child] after DNA tests confirmed that he is not the natural child of [Father].”

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<sup>16</sup> The Pendente Lite Order stated that “[t]his cause came to be heard..., upon the agreement of the parties, as evidenced by their respective signatures affixed hereto; and it appearing to the Court that said Agreed Order is well taken, and should be approved *pendente lite*.”

“A child support order is not retroactively modifiable, but may be modified only as of the date a petition for modification is filed.” *Buettner v. Buettner*, 183 S.W.3d 354, 358 (Tenn. Ct. App. 2005) (citing Tenn. Code Ann. § 36-5-101(a)(5)(2001); *Rutledge v. Barrett*, 802 S.W.2d 604, 606 (Tenn. 1991)). “[T]he court has no authority to forgive an accrued child support arrearage, but may only modify a child support obligation back to ‘the date that an action for modification is filed and notice of the action has been mailed to the last known address of the opposing parties.’” *State ex rel. Whitley v. Lewis*, 244 S.W.3d 824, 829 (Tenn. Ct. App. 2007) (quoting Tenn. Code Ann. § 36-5-101(f)(1)).

Father was not entitled to have the arrearages found by the trial court forgiven, *State ex rel. Whitley*, 244 S.W.3d at 829; he was, however, eligible for modification of his support back to the date he filed his petition to modify his obligation. *Buettner*, 183 S.W.3d at 358. It does not appear from the trial record that Father specifically requested that the new child support obligation be made retroactive to the date of filing of the petition. He is free to make such request on remand and we express no opinion as to the merits of same.

### 5. Life Insurance

Father asserts that the “Trial Court erred in failing to order Mother to carry a \$50,000 life insurance policy for the benefit of [the second child]” because “it is in the best interest of the minor child that Mother be required to carry a life insurance policy.”<sup>17</sup>

In support of his assertion regarding the life insurance policy, Father relies on Tenn. Code Ann. § 36-6-402(2)(F), which defines “Parenting Responsibilities” to require the parent to “[p]rovid[e] any financial security and support of the child in addition to child support obligations.” Father does not cite to any additional authority to support his position, fails to address the applicability of the above statute to this issue, and neglects to argue why he is entitled to appellate relief for the trial court’s failure to order Mother to obtain life insurance.

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<sup>17</sup> Father does not clarify whether Mother should have been ordered to obtain a life insurance policy in lieu of, or in addition to, Father’s policy.

A party's failure to properly argue an issue in accordance with Rule 27, Tenn. R. App. P.,<sup>18</sup> was discussed by this Court in *Bean v. Bean*, 40 S.W.3d 52 (Tenn. Ct. App. 2000), which stated that:

Courts have routinely held that the failure to make appropriate references to the record and to cite relevant authority in the argument section of the brief as required by Rule 27(a)(7) constitutes a waiver of the issue. Moreover, an issue is waived where it is simply raised without any argument regarding its merits. . . [P]arties cannot expect this court to do its work for them. This Court is under no duty to verify unsupported allegations in the party's brief, or for that matter consider issues raised but not argued in the brief.

*Bean*, 40 S.W.3d at 55-56.

We find this issue to be waived based on Father's failure to comply with Rule 27, Tenn. R. App. P.

*B. Reimbursement for the First Child's Contribution to the Automobile*

Father purchased a car for the first child when he turned 16 years old, for which the child contributed \$2,000 towards the purchase price. At some point during the proceedings in the lower court, Father took the car from the child and sold it. In her Counter-Petition for Criminal Contempt, Mother alleged that "Father agreed to purchase a 1999 Honda Accord automobile for the parties' 16 year old son's birthday present if the son could contribute \$2,000 toward the price of the car" and that, "[w]hen Father [wa]s not pleased with the son, he threaten[ed] to take the car away." Mother requested that "Father be ordered to place the automobile gift in the son's name or reimburse the \$2,000 paid...toward the purchase price" and that Father "stop threatening the son with his birthday present, and to pay the automobile insurance for the car."

The trial court awarded "Mother a judgment in the amount of \$889.09<sup>19</sup> to reimburse [the child] for the money he paid toward the purchase of the Honda Accord." In making the award, the

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<sup>18</sup> Rule 27(a), Tenn. R. App. P., states, in part pertinent, that:

(a) **Brief of the Appellant.** The brief of the appellant shall contain under appropriate headings and in the order here indicated:

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(7) An argument, which may be preceded by a summary of argument, setting forth the contentions of the appellant with respect to the issues presented, and the reasons therefor, *including the reasons why the contentions require appellate relief, with citations to the authorities and appropriate references to the record (which may be quoted verbatim) relied on.*

(Emphasis added).

<sup>19</sup> There is no explanation as to why the amount of the reimbursement stated by the court at trial is different from the amount stated in the trial court's final order.

trial court stated that “it’s not fair for the dad to profit from all the resale when his mom via grandma via [the child], whatever, made this contribution to the car. So, \$889.89 is what he needs to pay him to make up the equities of the situation.”

Upon a review of the record, we cannot find, nor does Mother cite, an order requiring Father to purchase a car for the child, to maintain the insurance on the car, or to refrain from taking it away. In fact, Mother admits in her Counter-Petition that, instead of being ordered to do so, “Father *agreed* to purchase a 1999 Honda Accord for the parties’ 16 year old son.” (Emphasis added). Father’s counsel argued at trial that Mother was not able to raise this issue as alleged in her Counter-Petition because the agreement between Father and the child regarding the car was “not part of the Martial Dissolution Agreement, wasn’t a part of the divorce, not part of any court order that’s between these two individuals.”

The primary purpose of a criminal contempt conviction is to vindicate the court’s authority. *Id.* (citing *Gunn v. Southern Bell Tel. & Tel. Co.*, 296 S.W.2d 843, 844 (1956); *Garrett v. Forest Lawn Memorial Gardens*, 588 S.W.2d 309, 315 (Tenn. Ct. App. 1979)). There are four essential elements of a contemptuous violation of a court order or command: that the order alleged to have been violated be “lawful,” and “specific and unambiguous;” that the person alleged to have violated the order have actually disobeyed the order; and that person’s violation of the order have been “willful.” *Konvalinka*, 249 S.W.3d at 354-55.

The record does not show that, relative to the child’s automobile, Father violated any order or command of the court or was in wilful disobedience to its orders; consequently, there was no basis upon which to hold him in contempt of court. Consequently, the trial court’s finding of contempt, to the extent it is based on matters related to the oldest child’s automobile, is reversed and the monetary judgment awarded Mother vacated.

### *C. Attorney’s Fees*

Father asserts that the trial court erred in awarding Mother attorneys’ fees because “there was no evidence before the Court that Mother lacked sufficient funds to pay her attorney or that paying attorney fees would deplete her resources.” In addition, Father contends that, “[i]f the Trial Court truly believed that an order for attorney fees was necessary..., it would have ordered attorney fees when the [April 1] Order was signed” and that “[t]he award of \$5,000.00 in attorney fees was to punish Father.”

In support of his first assertion, Father relies on this Court’s opinion in *Brown v. Brown*, 913 S.W.2d 163 (Tenn. Ct. App. 1994), which stated that an award of attorneys’ fees is “appropriate...only when the spouse seeking them lacks sufficient funds to pay his or her own legal expenses...or would be required to deplete his or her resources in order to pay these expenses.” *Id.* at 170. These considerations, however, are not dispositive in determining the appropriateness of

attorneys fees sought under Tenn. Code Ann. § 36-5-103.<sup>20</sup> See *Sherrod v. Wix*, 849 S.W.2d 780, 785 (Tenn. Ct. App. 1992) (holding that “ability to pay should not be the controlling consideration with regard to awards for legal expenses in custody or support proceedings” sought under Tenn. Code Ann. § 36-5-103); *Gaddy v. Gaddy*, 861 S.W.2d 236, 241 (Tenn. Ct. App. 1992) (holding that a “showing that [a party] is financially unable to pay his attorneys fees...is not a prerequisite for awarding fees under [Tenn. Code Ann. § 36-5-103]”).

Tenn. Code Ann. § 36-5-103 states, in part pertinent, that:

The plaintiff spouse may recover from the defendant spouse, and the spouse or other person to whom the custody of the child, or children, is awarded may recover from the other spouse reasonable attorney fees incurred in enforcing any decree for alimony and/or child support, or in regard to any suit or action concerning the adjudication of the custody or the change of custody of any child, or children, of the parties, both upon the original divorce hearing and at any subsequent hearing, which fees may be fixed and allowed by the court, before whom such action or proceeding is pending, in the discretion of such court.

Tenn. Code Ann. § 36-5-103(c).

The award of attorneys’ fees pursuant to Tenn. Code Ann. § 36-5-103 was discussed by this Court in *Sherrod v. Wix*, 849 S.W.2d 780 (Tenn. Ct. App. 1992) which held:

[T]rial courts may award attorney’s fees without proof that the requesting party is unable to pay them as long as the award is just and equitable under the facts of the case. The purpose of these awards is to protect the children’s, not the custodial parent’s, legal remedies. Accordingly, requiring parents who precipitate custody or support proceedings to underwrite the costs if their claims are ultimately found to be unwarranted is appropriate as a matter of policy.

*Sherrod v. Wix*, 849 S.W.2d 780, 785 (Tenn. Ct. App. 1992); *Sandusky v. Sandusky*, 1999 WL 734531, at \*7 (Tenn. Ct. App. Sept. 22, 1999). “[A]warding legal expenses in custody and support proceedings is discretionary with the trial court.” *Sherrod*, 849 S.W.2d at 785 (citing Tenn. Code Ann. § 36-5-103(c)).

Initially, both parties submitted affidavits of the attorneys’ fees incurred and the court declined to award fees to either party. At the hearing on Father’s Motion to Alter or Amend, Mother’s counsel re-raised the issue of attorneys’ fees and the trial court stated the following:

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<sup>20</sup> In their briefs on appeal, both parties agree that the applicable statute permitting the award of attorneys’ fees in this matter is Tenn. Code Ann. § 36-5-103.

Well, I do think [Mother is] entitled to attorney's fees. Like I said, the reason I didn't award anybody attorney fees, when I saw the affidavits, I was shocked at how extensive this case has gotten. Although, I understand attorneys cost money. And y'all have a lot of issues, a lot of issues.

But it's not fair for the mom trying to get child support and trying to support the children and she's the primary parent responsible for all this stuff and having to bear the burden of huge attorney's fees. And the child support comes nowhere close to these attorney's fees.

...I find that she's entitled to \$5,000 in attorney's fees. I know it's not what they asked. And I know both of them have spent in excess of \$15,000 in attorney's fees, but I think she's entitled to have that much of her attorney's fees paid, because a lot of this is what the Court calls posturing and parties struggling for control. And everyone gets away from the main emphasis, which is [the second child]

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So, yes, I'm amending [the previous order]. I'm granting her \$5,000.

While we are mindful of the deference this court is to give trial courts in awarding or denying fees in accordance with the statute, we are unable to discern any basis for the trial court's decision to make an award to Mother after having previously denied same. To the extent the award was for services rendered relative to Father's motion to amend the April 1 order, there is no proof of the amount of fees incurred by Mother in responding to the motion and attending the hearing. Moreover, we have determined that Father's initiation of the proceeding which is the subject of this appeal was not unwarranted. Accordingly, we vacate the award of attorney's fees to Mother.

## **V. Conclusion**

For the reasons set forth above, the decision of the Circuit Court is **AFFIRMED** in part, **REVERSED** in part, **VACATED** in part and **REMANDED** for proceedings consistent with this opinion.

Costs are assessed against Mother and Father, equally, for which execution may issue if necessary.

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RICHARD H. DINKINS, JUDGE